IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Second Appeal No. 254/06

Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	**Court's or Judge's Orders.**

CORAM : **A.P. Lavande,J**
DATE : 22nd September, 2006

Heard Mr. Najbile, learned counsel for the appellant.

2. This second appeal is preferred against the Judgment and decree dated 16th December, 2005 passed by the Additional District Judge, Gondia in Regular Civil Appeal No. 9/2004 dismissing the appeal filed by the appellant against the Judgment and decree dated 3rd October, 2003 passed by the Joint Civil Judge, Senior Division, Gondia in Regular Civil Suit No. 293/2000 in which the appellant was the defendant no.1 and respondent was the plaintiff.

3. The plaintiff filed the above suit for specific performance of contract in respect of the suit property against the appellant – defendant no.1 and three others. The suit was contested by the defendant no.1 only and after appreciating the evidence led by the parties the trial Court held that there was an agreement entered into

between the parties for sale of the suit land to the plaintiff for a consideration of Rs. 30,000/- and that the plaintiff had paid Rs. 25,000/- to the defendants on 3.5.1995. The trial Court refused the decree of specific performance to the plaintiff, however, ordered refund of the amount of Rs. 25,000/- with interest @ 6% p. a. from the date of the suit.

The appeal preferred by the defendant no.1 has been dismissed by the lower appellate court. Hence, the present second appeal.

4 Mr. Najbile, learned counsel for the appellant submitted that the agreement entered into between the parties does not mention that the amount of Rs. 25,000/- was paid to the defendants. He further submitted that the finding recorded by the trial court which has been confirmed by the lower appellate court that the plaintiff paid Rs. 25,000/- to the defendants is contrary to the evidence on record and the evidence on record does not establish that the plaintiff paid Rs. 25,000/- to the defendant no.1. He further submitted that the approach of the trial court in comparing the signature on the agreement with admitted signature without obtaining opinion from the expert is patently illegal. In support of his submission, the learned counsel relied upon the Judgment of the apex Court in the case of O. Bharathan

v. K. Sudhakaran and another (AIR 1996 Supreme Court, 1140). According to the learned counsel the findings given by both the courts below are contrary to the evidence on record and, therefore, deserve to be quashed and set aside and consequently this appeal deserves to be allowed.

5. I have considered the submissions made by the learned counsel for the appellant. The learned counsel could not make available the copy of the agreement entered into between the parties for perusal of this Court. That apart, perusal of the Judgments passed by the courts discloses that both the courts below upon appreciation of oral evidence led by the parties have come to the conclusion that the plaintiff had paid Rs. 25,000/- to the defendants as earnest money. I do not find any substance in the submission of the learned counsel for the appellant that the evidence on record at the most suggests that the amount was paid to the defendant no.2 Sudaam Meshram and not to the appellant. It is pertinent to note that it is a case of the plaintiff that the agreement was executed by all the defendants. Therefore, even if it is accepted that the amount was actually paid to Sudaam Meshram at the time of entering into the agreement of sale and not to the appellant same would not make much difference inasmuch as the payment of earnest money made to

Sudaam has to be taken as payment of earnest money by the plaintiff towards the agreement of sale to all the defendants. It is also pertinent to note that the defendants 2 to 4 against whom decree was passed by the trial court have neither filed appeal challenging the decree nor they were joined as respondents before the lower appellate court. The decree being joint and several against all the defendants, and therefore, has become final as against the defendants 2 to 4. It is also to be noted that defendants 2 to 4 have not been joined in the present second appeal as respondents.

6. In so far as the submissions made by the learned counsel that the trial court erred in law in comparing the disputed signature with the admitted signature contrary to the ratio laid down by the apex Court in O. Bharathan's case (supra), I do not find that the same is fatal to the case of the plaintiff. The trial Court as well as lower appellate court upon appreciation of oral and documentary evidence have come to the conclusion that the agreement for sale of the suit property was executed between the parties and further that an amount of Rs. 25,000/- by way of earnest money was paid to the defendants. In my opinion, this finding is borne out from the evidence on record and, therefore, cannot be said to be perverse. Therefore, even if the finding arrived at by the trial court on the basis of comparison of admitted and

disputed signature is incorrect the same does not advance the case of the appellant.

7. Perusal of the impugned Judgments and orders discloses that the findings given by both the courts below are based on evidence on record and, therefore, they can not be termed as perverse warranting interference in second appeal. In any event, no substantial question of law is involved in the appeal. Therefore, second appeal is summarily rejected.

C.A. No. 2454/06:

In view of the dismissal of the second appeal, this application has become infructuous. Therefore, the application is dismissed as infructuous.

Judge

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